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~~No. 80-000.~~

In the
Supreme Court of the United States.

October Term, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
TEAMSTERS LOCAL UNION NO. 25,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Did the First Circuit Court of Appeals properly conclude that an impasse in collective bargaining negotiations alone does not constitute an "unusual circumstance" within the meaning of *Retail Associates, Inc.*, 120 NLRB 388 (1958), and thus does not justify unilateral withdrawal by a single employer from multi-employer bargaining?

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NATIONAL LABOR RELATIONS BOARD AND
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RESPONDENTS.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below, Jurisdiction, and Applicable Statutory Provision.

The "Petition For A Writ Of Certiorari" adequately presents the information required under the above-noted headings.

Statement of the Case.

The instant matter came before the Court of Appeals for the First Circuit upon the application of the National Labor Relations Board (hereinafter, "the Board") for enforcement of its Supplemental Decision and Order issued on August 6, 1979, against Charles D. Bonanno Linen Service, Inc. (hereinafter, "Bonanno" or "petitioner Bonanno"). The application was brought pursuant to § 10(e) of the National Labor Relations Act (hereinafter, "the Act"), 29 U.S.C. § 160(e).

The subject matter of the instant case originally came before the First Circuit pursuant to an application of Bonanno under § 10(f) of the Act, 29 U.S.C. § 160(f), for review of the initial decision and order of the Board. However, subsequent to the docketing of said application, the Board, *sua sponte*, decided to review and to reconsider the issues raised in this case and was granted leave by the First Circuit to withdraw the certified list. The Supplemental Decision and Order referred to above is the result of that review and reconsideration.

The instant dispute grew out of the 1975-1976 contract negotiations between Teamsters Local Union No. 25 (hereinafter, "Local 25") and the New England Linen Supply Association (hereinafter, "the Association") which included Bonanno and nine of its competitors. For some years, Local 25 had negotiated collective bargaining agreements with the Association including the agreement that covered the period from September 21, 1972 through April 18, 1975. On February 19, 1975, Bonanno once again authorized the Association to represent it in negotiations, and in March, 1975, the negotiations commenced (Appendix A at 19-20).[1]

The negotiations continued and by May 15 the parties had reached an impasse over the issue of compensation. Subse-

[1] Citations to "Appendix A" are references to the appendices contained in the "Petition For A Writ Of Certiorari."

quently, on June 23, Local 25 instituted a selective strike against Bonanno which prompted most of the Association members to lock out their drivers. During the summer, the parties continued to meet, and during this time, two Association members contacted Local 25 "presumably in an effort to make a separate settlement"; however, no negotiations took place and no separate agreements were made (*id.* at 20).

By November 21, Bonanno had hired permanent replacements for all of its striking drivers, and on that date, it notified the Association and Local 25 that it was withdrawing from the Association. Local 25 did not consent to that withdrawal, and on April 9, 1976, it filed the unfair labor practice charges out of which the instant controversy has grown.

Subsequent to Bonanno's withdrawal, Local 25 continued to meet and bargain with the Association. As a result of the continued efforts of the parties, an agreement was reached on April 23, 1976 (*see id.* at 20-21), and, thereafter, Local 25 informed Bonanno that it considered Bonanno to be bound by that agreement.

Bonanno's withdrawal from the Association and its ultimate refusal to execute the multi-employer agreement formed the basis for Local 25's assertion that Bonanno was/is engaged in unfair labor practices as defined by §§ 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5).

Summary of Argument.

As detailed below, and contrary to the claims of petitioner Bonanno, the decision of the First Circuit herein is not in conflict with *Fairmont Foods Company* v. *NLRB*[2], as the Eighth

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[2]471 F.2d 1170 (8th Cir. 1972).

Circuit in that case was applying then applicable Board policy on the impact of a bargaining impasse on employer withdrawal rights.

Similarly, the decision of the First Circuit is not contrary to *NLRB* v. *Hi-Way Billboards, Inc.*,[3] *NLRB* v. *Associated Shower Door Co., Inc.*,[4] or *NLRB* v. *Independent Association of Steel Fabricators, Inc.*,[5] as the Fifth, Ninth and Second Circuits, in striking the balance between the conflicting interests inherent in matters involving the rights of employers to withdraw unilaterally from multi-employer bargaining, considered and relied on the union's negotiation of interim agreements with certain members of the employer groups.

Finally, while the decision of the First Circuit is contrary to *NLRB* v. *Beck Engraving Co., Inc.*,[6] the instant decision, unlike that of the Third Circuit, reflects the realities of collective bargaining and preserves the integrity of multi-employer bargaining.

Reasons for Denying Review.

Petitioner Bonanno has asserted herein that the decision below "conflicts with the decisions of five other circuit courts on the question of whether an employer may withdraw from a multi-employer bargaining unit upon the occurrence of an impasse in collective bargaining negotiations" (petition at 5). In support of that assertion, petitioner Bonanno cites: *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d

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[3]500 F.2d 181 (5th Cir. 1974).

[4]512 F.2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[5]582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979).

[6]522 F.2d 475 (3d Cir. 1975).

135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *Fairmont Foods Company* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972); and *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975) (*see id.* at 5 n.5), as instances where various courts have upheld an employer's right to withdraw unilaterally from multi-employer bargaining upon the existence of a negotiating impasse.

Said assertion, however, is substantially erroneous. Thus, unlike in the instant case, the Eighth Circuit, in *Fairmont Foods Company* v. *NLRB, supra*, was not asked to determine whether an impasse in negotiations justified a multi-employer association member's unilateral withdrawal from group bargaining, since the Board, at that time, apparently assumed that a bargaining impasse was a sufficient justification for a party's unilateral withdrawal from multi-employer bargaining.

In this regard, the cornerstone of the Board's policy regarding the right of an employer or a union to withdraw from multi-employer bargaining was set out in *Retail Associates, Inc.*, 120 NLRB 388 (1958), wherein the Board established guidelines for withdrawal. Pursuant to those guidelines, withdrawal by an individual employer or a union with respect to one or more employers is allowed prior to the start of negotiations only if adequate written notice is given. Once negotiations begin, a party may withdraw only in cases of mutual consent or "unusual circumstances." *Id.* at 395.

Prior to *Retail Associates, Inc.*, the Board permitted unfettered withdrawal at impasse. *See Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enforced in part and remanded in part*, 190 F.2d 576 (7th Cir. 1951). In fact, during this period the Board suggested that "employers [have] unlimited freedom unilaterally to fashion the scope of, or to completely destroy,

multi-employer bargaining units by simply withdrawing at any time from such units at their will or fancy." *Id.* at 418.

Subsequent to *Retail Associates, Inc.*, the Board continued its earlier impasse policy by indicating that an impasse in negotiations constituted an "unusual circumstance." *See Plumbers Union No. 323 (P.H.C. Mechanical Contractors)*, 191 NLRB 592, 592 n.1, 596 (1971); *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487, 1500 (1964); and *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27, 29 (1964). *But see Teamsters Local 717 (Ice Cream Council)*, 145 NLRB 865 (1964).[7] Thus, in *Fairmont Foods Co.*, 196 NLRB 849 (1972), the Board adopted the rulings, findings and conclusions of the trial examiner who had found that "respondent's complaint . . ., while it reflected disagreement between the Respondent and the other members of the group, was not the kind of impasse or other 'special circumstance' which would privilege the Respondent's otherwise untimely withdrawal from the group bargaining . . .." *Id.* at 856.

Accordingly, on review, the question of the impact of an impasse in multi-employer bargaining on employer withdrawal rights was not at issue, and as such, the Eighth Circuit's restatement[8] of the then Board policy on said rights properly cannot be characterized as inconsistent with the affirmance by the First Circuit of present Board policy.

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[7] In *Teamsters Local 717 (Ice Cream Council)*, the Board, in the context of a § 8(b)(1)(B) charge, seemingly suggested that an impasse alone would not justify an employer's unilateral withdrawal. In this regard, the Board stated that "[i]n a situation such as this, where there has been a breakdown in negotiations leading to an impasse and a resultant strike, an employer, *if he so chooses and the union agrees*, is not precluded from voluntarily withdrawing from a multiemployer unit." 145 NLRB at 870 (emphasis added).

[8] When an impasse in negotiations is reached, withdrawal by a member of a multi-employer bargaining group is excused.

471 F.2d at 1172.

In addition to the holding in *Fairmont Foods Company* v. *NLRB*, *supra*, petitioner Bonanno, as noted above, has asserted that the conclusions of the courts of appeals in *NLRB* v. *Hi-Way Billboards, Inc.*, *supra*, *NLRB* v. *Associated Shower Door Co., Inc.*, *supra*,[9] and *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, *supra*, are in conflict with the conclusions of the First Circuit herein. In so arguing, petitioner Bonanno incorrectly states that the courts of appeals in said cases concluded "that an impasse in multi-employer bargaining is an unusual circumstance within the meaning of *Retail Associates*, *supra*" (petition at 8) (see also petition at 10).[10]

In this regard, while the employer withdrawals at issue in *Hi-Way Billboards, Inc.*, *Associated Shower Door Co., Inc.* and *Independent Association of Steel Fabricators, Inc.*, all occurred subsequent to the existence of a bargaining impasse, each was occasioned, at least in part, by the union's negotiation of interim agreements with other employer association members. Moreover, each court of appeals, in overturning the decision of the Board, focused on the "whipsaw" effect of the union's negotiation of interim contracts. Thus, for example, the Ninth Circuit in *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232, stated the following:

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to

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[9] The Ninth Circuit recently reaffirmed its *Associated Shower Door* holding and analysis in *H&D, Inc.* v. *NLRB*, F.2d , 105 LRRM 3070 (9th Cir. 1980).

[10] The courts which have considered the issue (with the exception of the First Circuit) have uniformly concluded that in balancing the conflicting legitimate interests of the parties in the multi-employer bargaining context, an employer must be allowed to withdraw from a multi-employer group upon impasse.

one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see The Evening News Association*, 154 N.L.R.B. 1494, 1495-1497 (1965), enforced *sub nom. Detroit Newspaper Publishers Association* v. *NLRB*, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached *and* a union then engages in selective picketing *and enters into substantial individual agreements with employers who had been members of the multi-employer unit*, the withdrawal *of the remaining members of the unit*, if unequivocally communicated, should be permitted. *See NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181, 183-184 (5th Cir. 1974); *Fairmont Foods Company* v. *NLRB*, 471 F.2d 1170, 1172-1174, 1174 n.1 (8th Cir. 1972); *Connell Typesetting Company*, 212 N.L.R.B. No. 140 (1974)" (emphasis added).

See also NLRB v. *Hi-Way Billboards, Inc.*, 500 F.2d at 184[11]; *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d at 147.[12] Accordingly, *Hi-Way Billboards, Inc.*,

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[11] In a case like this one involving a single Union and several employers, the Board's response simply does not ring true so long as the Union may in effect withdraw from the multi-employer association with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit.

[12] That Local 455 agreed to negotiate separately with four former members of the Association during the August to January interval (Dextra, Atwater, North Shore, and Charla) is also indicative of the inability of the union and the Association to engage in fruitful discussion. Moreover, although the union did not selectively picket or otherwise

Associated Shower Door Co., Inc. and *Independent Association of Steel Fabricators, Inc.* each presented a factor which was considered significant by the courts of appeals in finding an "unusual circumstance" and which is not present in the instant case, *i.e.*, the existence of interim agreements.

The existence of this additional factor is a particularly compelling distinguishing characteristic given the analytical process applicable to questions arising in the context of multi-employer bargaining. In this regard, this Court in *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957), noted that the resolution of questions regarding the rights of both employers and unions in the context of multi-employer bargaining required the balancing of conflicting legitimate interests, and that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.* at 96. Thus, in cases involving Board determinations of the rights of employers to withdraw from multi-employer associations, the circuit courts of appeals are reviewing the balance struck by the Board. Clearly, the decisions of the courts of appeals reflect all the factors considered and therefore, must be compared in the light of those factors.

In sum, petitioner Bonanno, in characterizing the courts' holdings in *Hi-Way Billboards, Inc.*, *Associated Shower Door Co., Inc.* and *Independent Association of Steel Fabricators,*

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pressure any particular member, its willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike. *Cf. NLRB* v. *Association Shower Door, supra*, 512 F.2d at 232 [*sic*]; *N.L.R.B.* v. *Beck Engraving, supra*, 522 F.2d at 482-83; *N.L.R.B.* v. *Hi-Way Billboards, supra*, 500 F.2d at 183.

Inc. has ignored the courts' reliance on the existence of interim agreements in balancing the conflicting legitimate interests in each case and thereby has mischaracterized those holdings as being in conflict with the instant decision of the First Circuit.

Lastly, while petitioner Bonanno correctly asserts that *NLRB* v. *Beck Engraving Co., Inc.* is contrary to the decision of the First Circuit (*see* Appendix A at 33),[13] Bonanno's reliance in support of its Petition on the Third Circuit's reasoning in *Beck Engraving Co.* is misplaced.

In this regard, the flaws in the analysis of the Third Circuit are set forth succinctly in the opinion of the First Circuit and need not be repeated herein (*see id.* at 29-30, 33-36). However, petitioner Bonanno's suggestion that an impasse in bargaining destroys the salutory purposes of multi-employer bargaining demands comment (*see* petition at 5, 6, 14).

It is apparently undisputed that in resolving questions arising in the context of multi-employer bargaining, the Board and, when applicable, the courts, must seek to preserve the integrity of multi-employer bargaining. *See NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen Supply Co.), supra.* However, the suggestion by petitioner Bonanno that allowing employer withdrawal at impasse furthers, or at least does not hinder, the concept of multi-employer bargaining because the benefits of group bargaining are frustrated by an impasse ignores the realities of collective bargaining.

First, an impasse in bargaining can never be characterized as "unusual". Rather, an impasse is an integral part of bargaining which often occurs very early in the bargaining process. *See, e.g., Fairmont Foods Company* v. *NLRB, supra* (impasse reached after one month of bargaining); *NLRB* v. *Hi-Way Billboards, Inc., supra* (impasse reached after less than two months of bargaining); *NLRB* v. *Associated Shower*

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[13] By contrast, the *Beck* case is squarely on point.

Door Co., Inc., supra (impasse reached after one month of bargaining); and *NLRB* v. *Association of Steel Fabricators, Inc., supra* (impasse reached after twenty days of bargaining). In addition, in only the most rare situations does an impasse mean an end to collective bargaining. Thus, in all the cases cited by petitioner Bonanno, the union and the association continued to bargain after impasse and ultimately reached an agreement. Accordingly, since an impasse is a regular part of collective bargaining, its existence does not bare on the effectiveness of multi-employer bargaining as a tool for promoting labor stability.

Second, it has been stated that multi-employer bargaining "rests on the reality of the consent of the union and of each employer . . .." *Carvel Co.* v. *NLRB*, 560 F.2d 1030, 1035 (1st Cir. 1977). That consent, however, is a sham if an employer can manipulate the process and create a basis for unfettered withdrawal. In this regard, since the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession . . .", 29 U.S.C. § 158(d), an impasse can easily be created by an employer simply by that party remaining steadfast in an unacceptable position. Effective collective bargaining is impossible if the parties are not committed to reaching a mutually beneficial agreement.

Finally, the ready availability of withdrawal rights can only lead to the frustration of the multi-employer bargaining process and a return to individual negotiations and the resulting instability and duplication of efforts. For example, in the instant case, Bonanno readily accepted the benefits of multi-employer bargaining including the Association-wide lock out which protected Bonanno's competitive position in the industry. While so insulated, Bonanno hired permanent replacements for its striking drivers (*see* Appendix A at 20). After restaffing, however, Bonanno no longer needed the protection

afforded by the Association and so it withdrew from the group. Thus, Bonanno's withdrawal from the Association served only its own interest and clearly called into question the advisability for either Local 25 or the other Association members of employing the multi-employer collective bargaining process.

In sum, a bargaining impasse does not diminish the benefits of or the need for multi-employer bargaining. However, permitting unilateral withdrawal at impasse unquestionably jeopardizes that process.

Conclusion.

For the reasons set forth in detail above, Teamsters Local Union No. 25 respectfully urges that this Court deny the instant "Petition For A Writ Of Certiorari."

Respectfully submitted,

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